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No. 93-507

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND,
d/b/a Tulane Medical Center Hospital and Clinic, *et al.*,
Petitioners,

v.

DONNA E. SHALALA, Secretary of
Health and Human Services,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR ASSOCIATION OF AMERICAN MEDICAL COLLEGES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1395ww(h)(2)(A), which provides that a hospital's Medicare reimbursement for graduate medical education costs ("GME costs") for years beginning on or after July 1, 1985, shall be based in substantial part upon the amount of the hospital's fiscal year 1984 GME costs "recognized as reasonable under this subchapter," authorizes the Secretary of Health and Human Services to reaudit fiscal year 1984 and redetermine, long after the initial audits for that year had become final and binding by regulation, the amount of such costs "recognized as reasonable."

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INTEREST OF THE *AMICUS CURIAE*

The Association of American Medical Colleges ("AAMC") was founded more than a century ago to improve the process and quality of medical education. Its members include all accredited medical schools in both the United States and Canada; nearly 400 major teaching hospitals; more than 90 academic and professional societies representing some 72,000 members of medical faculties; and students and medical residents at these

schools and hospitals. Strengthening the quality of graduate medical education is a matter of special concern to AAMC and its many members.

This case is important to AAMC. At stake is the level of federal Medicare reimbursement for the graduate medical education costs ("GME costs") incurred by teaching hospitals. The level of reimbursement directly affects the financial well-being of AAMC's hospital members and has a significant bearing on the quality of the graduate medical education that these hospitals will be able to provide. The issue in this case is of grave concern not only to the hospitals but also to medical students and residents and all other members of AAMC, for whom the quality of medical education is a very high priority. AAMC's interest in this case is patent, and both parties have consented to the filing of this brief.

ARGUMENT

In routine cases involving disputes over the validity of a federal regulation, it is customary and appropriate for this Court to await the development of a circuit conflict before granting certiorari. But this case is not routine. It is urgently important to the nation's teaching hospitals that the question presented be reviewed and decided on a nation-wide basis. Prompt resolution of this question will free the hospitals from continuing financial uncertainty and can relieve them, the lower federal courts, and the Department of Health and Human Services of the burden and expense of litigating hundreds of lawsuits over the next several years. It is virtually certain, moreover, that if the Court does not decide the question presented in this case now, it will need to do so later. For all concerned, the best and most efficient time for resolving this matter is now.

Pursuant to the 1989 regulation whose validity is at issue in this case, 42 C.F.R. § 413.86, hundreds of teaching hospitals have been subjected to reaudits of their

GME costs for the annual reporting period that began on or after October 1, 1983, but before October 1, 1984 ("fiscal year 1984"). The purpose of these reaudits is to establish benchmarks for Medicare reimbursements of GME costs for subsequent years. But the reaudits were unnecessary and wholly inappropriate. Most of the hospitals already had been audited and had received "final and binding" determinations of the amount of fiscal year 1984 GME costs recognized as reasonable, and thus subject to reimbursement, under 42 U.S.C. § 1395ww(a)(4). *See* Pet. App. 6a; 42 C.F.R. § 405.1807. By their very nature, the audits originally conducted in the regular course of administering the Medicare program were likely to be more accurate and more reliable than the tardy reaudits required by the 1989 regulation: changes in personnel, both at the hospitals and at the fiscal intermediaries that audit them, *see* 42 U.S.C. § 1395h, have impaired institutional memories of relevant facts; and personal recollections inevitably have been dimmed by the passage of time. In addition, many of the hospitals had been authorized by regulation to dispose of records relating to fiscal year 1984 and had lawfully done so prior to promulgation of the 1989 regulation, and thus prior to reaudit. *See* 42 C.F.R. § 405.481(g)(3); 55 Fed. Reg. 36063 (1990). In these circumstances, the "search for truth" upon reaudit is an illusory undertaking. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). The very concept of reauditing was badly misguided.

Reauditing has caused an explosition of litigation. All or almost all of the reaudits called for by the 1989 regulation have been completed by fiscal intermediaries. But more than 500 teaching hospitals have taken appeals to the Provider Reimbursement Review Board ("PRRB") pursuant to 42 U.S.C. § 1395oo(a)(1), challenging the results of those reaudits and, in most if not all cases, the validity of the 1989 regulation under which the reaudits were conducted. *See* Pet. 9. Those appeals are still pending. The decision below does not foreclose any of the

issues raised by such appeals (except for hospitals located in the District of Columbia), for a hospital has the right to seek judicial review of an adverse PRRB decision in the federal district court for the judicial district in which that hospital is located. 42 U.S.C. § 1395oo(f)(1).

As a practical matter, hospitals will be compelled to seek judicial review due to the amounts at stake in these cases. AAMC has surveyed its hospital members and learned that, of those adversely affected by reaudit (and most were), the average liability for open years is more than $2.5 million. That figure understates the true importance of the issue to the hospitals, for the level of GME costs fixed by the reaudits is to be used as the benchmark for determining reimbursement amounts for all future years. This suggests that most hospitals are likely to take their cases to court and, as a result, that the question presented in this case, as well as a myriad of hospital-specific questions relating to the correctness of individual reaudits, ultimately will be presented to other—and very possibly all other—federal courts of appeals.

In reviewing these cases, the courts of appeals naturally will be free to reconsider the issue decided by the D.C. Circuit in this case. The arguments adduced by petitioners on the merits of this issue are cogent and almost certainly will be adopted by one or more of the other courts of appeals if and when the issue comes before them. Both singly and collectively, petitioners' arguments furnish a powerful basis for rejecting the decision below. At least two of those arguments warrant repetition here.

First, the 1989 regulation is contrary to the plain meaning of 42 U.S.C. § 1395ww(h)(2)(A). The statute provides for the reimbursement of post-1984 GME costs on the basis of the amount of fiscal year 1984 GME costs "recognized as reasonable under this subchapter,"

i.e., subchapter XVIII. The only GME costs "recognized as reasonable" under subchapter XVIII are those determined by a fiscal intermediary in a notice of program reimbursement (or by the PRRB or a court on appeal from that notice). 42 U.S.C. § 1395oo(a)(1)(A)(i); 42 C.F.R. § 405.1803(a)(1). An intermediary may reopen its determination within three years, 42 C.F.R. § 405.1885(a), but if it does not do so the determination becomes "final and binding." 42 C.F.R. § 405.1807. At that point, the amount of GME costs "recognized as reasonable under this subchapter" has been definitively established and is no longer subject to challenge. Those are the costs that the statute identifies as the base for computing post-1984 reimbursement.

The 1989 regulation is not faithful to the statute. It does not peg reimbursement of post-1984 GME costs to the level of costs that were "recognized as reasonable" for fiscal year 1984 pursuant to existing procedures under subchapter XVIII. Instead, the regulation establishes a new "methodology for Medicare payments" outside the existing scope of subchapter XVIII, pursuant to which a different set of fiscal year 1984 GME costs is determined for use as the base in computing post-1984 reimbursement. 42 C.F.R. § 413.86(a)(1).

The establishment of a new and different method of determining reasonable costs would have been questionable, even as applied only to those hospitals whose fiscal year 1984 was still open for audit under subchapter XVIII. But many teaching hospitals, including the six petitioners and a substantial number of AAMC's hospital members, had received final and binding determinations of the amount of their fiscal year 1984 GME costs. For those hospitals, the amount of such costs "recognized as reasonable under this subchapter" already had been established. Indeed, the Secretary acknowledged as much in the 1989 regulation itself, for the regulation stipulates that reauditing will not and cannot change the actual level of

1984 cost reimbursement payable to such hospitals. *See* Pet. App. 6a.

Consequently, for many if not most hospitals, reauditing is ineffectual to change the amount of fiscal year 1984 GME costs "recognized as reasonable under this subchapter." As applied to such hospitals, the 1989 regulation, which pegs reimbursement of post-1984 GME costs to a standard other than that prescribed by the statute, is plainly invalid. *See generally* Pet. 12-13.

Second, the 1989 regulation frequently leads to a result that, in yet another way, is squarely contrary to the statute. The regulation demands a reaudit. In many cases, however, it is not possible to reaudit fiscal year 1984 because the hospital, after receiving a final and binding determination of GME costs, lawfully disposed of its records relating to that year. 55 Fed. Reg. 36063-64 (1990). In those cases, the Secretary has concluded that the regulation requires some later year to be reaudited, and that the later year's costs are then to be used as the base for computing post-1984 reimbursements. *Id.* The statute, however, specifies that it is a hospital's 1984 GME costs, not those of some other year, that must be used in computing post-1984 reimbursement. Any regulation that works at such obvious cross-purposes to the underlying statute has been fatally misconceived. *See generally* Pet. 17-18.

In view of these and other arguments demonstrating the invalidity of the 1989 regulation, it is virtually inevitable that if the Court does not grant certiorari in this case, sooner or later a second court of appeals will reject the decision below. At that point, the Court will be constrained to resolve the conflict. In the meantime, however, final determination of the proper level of GME cost reimbursements for 1985 and succeeding years will have been held in limbo for almost every teaching hospital in the country; and over this time, hundreds of teaching hospitals may have been under-reimbursed by

hundreds of millions of dollars in the aggregate. Such continuing financial uncertainty and under-reimbursement will impede the hospitals' efforts to plan rationally for the future and threatens to impair their ability to maintain the quality of graduate medical education for which they are responsible.

If it finally is determined, as petitioners cogently argue, that the 1989 regulation was not sanctioned by statute, the entire costly process of litigating hundreds of cases before the PRRB and in the courts will have been for naught. This Court can and should short-circuit this process, and dispel the present cloud of legal and financial uncertainty that overhangs the nation's teaching hospitals, by granting certiorari in this case and resolving the issue once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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